BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: December 22, 1998
Case No: 98-INA-136

In the Matter of:

AMERICAN RADIO SYSTEMS
Employer

On Behalf of:

FUAT ABDULLAH
Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

Certifying Officer: Raimundo A. Lopez
Boston, Ma.

John C. Holmes
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. § 656.26 (1995) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to the Immigration and Nationality Act of 1990 ("Act"). 8 U.S.C. § 1182(a)(5) (1990). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the act, 8 U.S.C. § 1182(a)(5) (1990), and Title 20, Part 656 of the Code of Federal Regulations ("Regulations"). Unless otherwise noted, all the regulations cited in this decision refer to Title 20.

Under the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

American Radio Systems ("Employer") applied for alien employment certification for Fuat Abdullah ("Mr. Abdullah"), an employee. After receipt of the application the position was advertised to the public. The application for alien employment certification described the job to be performed as follows:

> Co-production of jingles and promotional material for the radio station as well as music research assistance for programming. Board Operation and studio engineering for designated on-air shifts and off-air shifts.

(AF 91). Minimum requirements for the position included a degree in Music Production and Engineering and a Federal Communications Commission ("FCC") License. No minimum amount of experience was required for the position.

A number of applicants responded to the job listing. However, Employer did not schedule any interviews since it considered all of the applicants unqualified.

Upon a review of the application, the Certifying Officer ("CO") issued a Notice of Findings dated June 20, 1997, which signified an intent to deny the application for certification. The Notice of Findings stated that the employer improperly rejected U.S. applicants based on Employer's FCC License and degree requirement. With respect to the FCC License, the CO argued that the employer hired Mr. Abdullah as a Production Assistant before Mr. Abdullah obtained an FCC License and thus it was improper to reject U.S. workers for the failure to have such a license. As a result of this, the CO requested certain types of documentation:

> . . . [T]he employer must document how the requirements relate to the job duties and show how one could not perform the job duties without having obtained all of these requirements. This documentation must be presented as to show the relationship between the job requirements and the job duties. The employer must document that it has only hired Production Assistants with this type of background and skills. The employer must provide the name of the individuals hired in the past three years, along with a copy of their job descriptions and qualifications prior to hire.

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

(AF 34). The CO's findings are supported by the record. The application for alien employment certification filed with the DOL demonstrates that Mr. Abdullah was hired in August 1994 and he received a permanent FCC License on December 13, 1994. (AF 94-5).

Employer, in its Rebuttal dated July 1, 1997, set out the purpose and reasoning behind its minimum requirements. With respect to the requirement of an FCC License, Employer stated that the FCC requires any person operating the boards of a live radio broadcast to hold a license. (AF 10). To rebut the CO's finding that Mr. Abdullah did not have a license when hired, the employer offered this explanation:

> Mr. Abdullah operated our boards under a temporary license at the beginning of his employment. This is a standard procedure for someone applying for a permanent FCC License. When Mr. Abdullah commenced work at our station, his duties were strictly geared towards off-air production and music research, since our new station . . . was not on the air at that time. However, we still needed production assistance for the launch of the station and as soon as the station debuted at Boston airwaves, Mr. Abdullah had attained his FCC License.

(AF 11). The employer did not send any documented evidence of the temporary license with its rebuttal. (AF 8-32) (Rebuttal and attachments). The only documented evidence of the temporary FCC License was received after issuance of the Final Determination, along with the Request for Reconsideration. (AF 3).

In the Final Determination issued September 2, 1997, the CO based its denial of certification upon a number of reasons. First the CO found that the employer failed to document in its rebuttal the existence of a Temporary FCC License by providing a copy of the License. Additionally, the CO found that there were many qualified U.S. applicants that were turned down since they did not have an FCC License. Since the record established that the alien also did not have a license at the time of hire, the CO concluded that U.S. workers were not rejected solely for lawful job related reasons. The CO reasoned thusly, ". . . it would appear that the U.S. workers should be afforded the same opportunity, i.e., to apply for an FCC License while employed by the petitioner." (AF 6).

In the Request for Reconsideration dated September 29, 1997, the employer reasserted its position with respect to the FCC License and included a copy of Mr. Abdullah's Temporary FCC License, as an attachment. On October 7, 1997, the CO denied the request for reconsideration since the Employer failed to raise any new issues that could not have been addressed in the rebuttal. (AF 1).

The Employer made a timely request for review before this Board on the issue of its FCC License requirement.

DISCUSSION

This case presented a number of questions that concerned the Employer's requirement of an FCC License. Specifically this case raised concerns about the proper compliance with 656.21(b)(5) and 656.21(b)(2). We find that the Employer has failed to satisfy its burden to produce documentation as required by 656.21(b)(5) and therefore we do not reach the question of unduly restrictive job requirements under 656.21(b)(2) (See infra note 3).

The Regulations state in pertinent part that; (1) an employer must document that its requirements are the actual minimum requirements for the job opportunity and that the employer has not hired anybody with fewer qualifications than the stated minimum requirements or; (2) that it is not feasible to hire anybody with lesser qualifications. 20 C.F.R. § 656.21(b)(5). Additionally, an employer is obligated to comply with a CO's reasonable request for information. Texas State Technical Inst., 89-INA-207 (Apr. 17, 1990); Medical Designs, Inc., 88-INA-159 (Dec. 19, 1988) (en banc).

1. Actual Minimum Requirements

An employer must show that it has not previously hired personnel for the position who do not possess the requirements specified in the labor certification application. Texas State Technical Inst., 89-INA-207 (Apr. 17, 1990). This is a valid requirement since it is logical to conclude that an employer who has hired someone with fewer qualifications than its minimum requirements, did not list its actual minimum requirements.

In Texas State, the employer, a technical school, admitted in rebuttal that it had hired an instructor who possessed only an Associates Degree. Given this, the Board determined that the employer did not specify the actual minimum requirements when it called for applicants to hold an M.S. or B.S. and affirmed the CO's denial of certification.

In the instant case the record revealed that the employer hired the alien to the position of Production Assistant with lesser qualifications than it requested of U.S. workers. Mr. Abdullah did not have a permanent license until December 1994, when he was hired in August of that same year. Given this, the employer must document that it was not feasible for it to hire U.S. workers with fewer qualifications than its stated requirements.

2. Feasibility

An employer has violated section 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker with that training or experience. Capriccio's Restaurant, 90-INA-480 (Jan. 7, 1992); Office-Plus, Inc., 90-INA-184 (Dec. 19, 1991); Gerson Indus., 90-INA-190 (Dec. 19, 1991); Texas State Technical Inst., 89-INA-207 (Apr. 17, 1990).

This feasibility requirement was reviewed in Texas State, a case with a similar factual background to this one. In Texas State, the employer failed to provide specific documents requested by the CO in the Notice of Findings. 89-INA-207 (Apr. 17, 1990). Upon review the Board determined that Employer had not met its burden to document why it is infeasible now for it to hire employees with lesser qualifications. The Board found that the ". . . bare statement that 'the program is expanding and new faculty are employed with the appropriate preparation and experience to develop new courses' is vague and unsupported." The Board based this conclusion in part on the employer's failure to provide the documentation requested by the CO. Id.

In the instant case, the record revealed that Mr. Abdullah was hired by the employer in August 1994. (AF 94). Mr. Abdullah received his permanent FCC License on December 13, 1994 (the evidence of the temporary license was not submitted until after the Final Determination was issued and therefore is not on the record for our review).[2] Based on these facts, the CO requested specific documentation. Employer rebutted with unsupported statements that an FCC License was not necessary since the station was not on the air when Mr. Abdullah was hired and that Mr. Abdullah had an FCC License by the time the station was on the air. This rebuttal was not sufficient to carry Employer's burden, where the CO indicated a desire for concrete documentation, that evidences why it was infeasible to hire U.S. workers without an FCC License. Since the CO did not have any evidence of Mr. Abdullah's temporary license, there was no evidence of when the station opened and the employer never documented why it could not allow a U.S. worker to apply for license while working there, the denial was warranted.[3]

In the instant case the employer was obligated to comply with the CO's reasonable request for documentation. The Employer was asked to produce documentation of its actual minimum requirements when it was evident that Mr. Abdullah was hired without a license. Employer produced no proof that Mr. Abdullah was hired with a license, or in the alternative, that it was not feasible to hire other workers without a license. Therefore, the CO denied the certification based

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[2] The evidence of the Temporary FCC License was submitted to the CO along with the Employer's request for Reconsideration. This evidence should have been, and there is no reason to believe that it could not have been, submitted with the rebuttal. The failure of the Employer to submit this evidence is proper grounds for the CO's denial of the Motion for Reconsideration. See Royal Antique Rugs, Inc., 90-INA-529 (Oct. 30, 1991). Since the CO properly refused to consider this evidence as untimely, the evidence is not reviewable by the Board. Databyte Technology, Inc., 93-INA-263 (Jun. 28, 1994). However, even if we could review it, we note that the temporary permit submitted was dated in November 1994, three months after the Alien began working for the Employer.

[3] We decide this case without deciding whether or not the requirement of an FCC License is unduly restrictive pursuant to 656.21(b)(2). We suffice it to say, in dicta, that there is sufficient authority in Board decisions to suggest that an employer may require a license based upon a showing of business necessity. See Karinen, 90-INA-73 (Jan. 25, 1991) Pay Med/Health Assistance for Travelers, 89-INA-166 (Feb. 6, 1990); Spanish American Inst., 90-INA-435 (Mar. 18, 1991) (requirement of a state teaching license will depend on the dictates of state law); Promex Corp., 89-INA-331 (Sept. 12, 1990). This case however is decided based upon the inability of the Employer to properly document its actual minimum requirements and thus we do not reach the merits of 656.21(b)(2).

on the Employer's inability to demonstrate that its requirements were the actual minimum requirements for the position and we agree with that determination.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby **AFFIRMED.**

For the Panel:

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John C. Holmes
Administrative Law Judge